

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7287

75-7363

original

To be argued by
LOUIS L. STANTON, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7363

B
P/S

UNITED BANK LIMITED,

Plaintiff-Appellant,

—against—

COSMIC INTERNATIONAL, INC.,

Defendant-Appellee.

[One of consolidated appeals Nos. 75-7287, 75-7320,
75-7325 and 75-7363.]

APPEAL OF THE DISTRICT COURT'S JUDGMENT

**BRIEF OF PLAINTIFF-APPELLANT
UNITED BANK LIMITED**

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July 7 1975

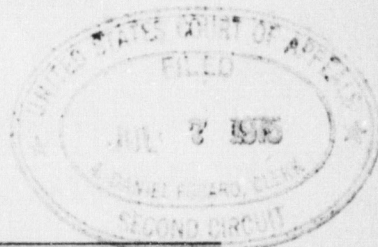




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[One of consolidated appeals Nos. 75-7287, 75-7320,
75-7325 and 75-7363.]

APPEAL OF THE DISTRICT COURT'S JUDGMENT

BRIEF OF PLAINTIFF-APPELLANT UNITED BANK LIMITED

Issue for Review

Is United Bank Limited, the successful plaintiff in a suit for the unpaid proceeds of seven Trust Receipts, entitled as a matter of law to interest from the date payment became due under the terms of each Trust Receipt?

Statement of the Case

This case¹ is in the nature of an interpleader action. The issue below was: Who is entitled to funds in the total principal amount of \$433,365.96 which became due from Cosmic International, Inc. between February 8 and May 31, 1972 under the terms of seven Trust Receipts?² The District Court, Hon. Charles L. Briant, Jr., awarded the funds to appellant United Bank Limited together with interest at the legal rate from the date United Bank Limited filed its complaint.³ Without discussion the District Court failed to award interest for the time between the breaches and the commencement of suit.

¹ Cosmic owed funds for which it was sued both by United Bank Limited (of Pakistan) and Janata Bank and another (of Bangladesh). The two suits were consolidated on consent, and were tried jointly with a similarly consolidated case involving Cosmic and similar questions but different plaintiffs and funds. In each consolidated case, the Pakistan plaintiffs won and the disappointed Bangladesh plaintiffs are appealing. The instant appeal, however, is by a successful plaintiff and relates only to the amount of interest awarded.

The same question is raised on appeal by the National Bank of Pakistan, which adopts the arguments and authorities set forth herein.

² Annexed hereto as Exhibit A is a schedule detailing the date payment became due under each Trust Receipt and the amount of each such payment. The payments were not made.

³ The District Court's decision dated March 31, 1975 provides, in part:

"United Bank Limited is entitled to recover the sum of \$433,365.96, plus interest at six percent (6%), computed from December 14, 1972, *the date of filing of the earlier of the two suits.*" (Emphasis added) (Joint Appendix [hereinafter "JA"], p. 39).

United Bank Limited's complaint was actually filed on December 8, 1972 and the District Court's judgment awarded interest from that date. (JA, pp. 42-3).

ARGUMENT

I.

United Bank Limited is entitled as a matter of law to interest on the proceeds of the Trust Receipts from the earliest ascertainable date the cause of action arose, i.e., the date payment became due under each Trust Receipt.

New York CPLR Section 5001 controls the date from which interest is computed in this diversity action for breach of contract. *Spector v. Mermelstein*, 485 F.2d 474, 481 (2d Cir. 1973); *Julien J. Studley, Inc. v. Gulf Oil Corp.*, 425 F.2d 947, 949 (2d Cir. 1969); *Spanos v. Skouras Theatres Corp.*, 235 F. Supp. 1, 17 (S.D.N.Y. 1964), *aff'd*, 364 F.2d 161 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966).

New York CPLR Section 5001 provides, in part:

"(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

"(b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item

from the date it was incurred or upon all of the damages from a single reasonable intermediate date."

This Court has repeatedly held that CPLR Section 5001 does not permit the trial court to exercise any discretion in the application of that section. *Menendez v. Saks & Co.*, 485 F.2d 1355, 1374 (2d Cir. 1973), *cert. granted sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 416 U.S. 981 (1974); *Spector v. Mermelstein*, 485 F.2d 474, 482 (2d Cir. 1973); *Julien J. Studley, Inc. v. Gulf Oil Corp.*, 425 F.2d 947, 950 (2d Cir. 1969).

Menendez v. Saks & Co. involved entitlement to the proceeds of certain shipments of cigars exported from Cuba to the United States both before and after several Cuban tobacco companies became subject to "intervention" (i.e., nationalization) orders of the Cuban government. The District Court awarded the Cuban government intervenors—the officials who took control of the cigar companies—the proceeds of cigar shipments made subsequent to the nationalization together with pre-judgment interest from June 28, 1961.⁴

On appeal, the importers argued that no interest should be awarded for the period prior to May 16, 1967, the date on which the importers were able to obtain jurisdiction over the intervenors.

⁴ This was the date the intervenors commenced an action in the United States District Court for the Southern District of New York to prevent the former owners of the cigar factories from attempting to recover the proceeds of certain cigar shipments. It is unclear whether the District Court believed this to be "the earliest ascertainable date the cause of action existed." The intervenors did not argue that interest should have started running any earlier, nor appeal the award of interest.

This Court rejected the importers' argument, stating:

"The short answer is that N.Y. CPLR § 5001 mandates the award from the earlier date. It provides that '[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract' and ' . . . shall be computed from the earliest ascertainable date the cause of action existed. . . .' We have recently reaffirmed that this provision does not allow any discretion on the part of the trial court in cases within its purview. *Spector v. Mermelstein*, 485 F. 2d 474, 481 (2d Cir. 1973)." 485 F.2d at 1374.

Spector v. Mermelstein was an action by a client against his former attorney for negligence and breach of fiduciary duty. The District Court awarded the plaintiff damages but denied pre-judgment interest. The defendant appealed the award of damages and the plaintiff cross-appealed from the failure to award pre-judgment interest.

After holding that the District Court's findings as to negligence and breach of fiduciary duty were supported by substantial evidence, this Court turned to the plaintiff's cross-appeal:

"Plaintiff's cross-appeal from the denial of pre-judgment interest gives us considerably more trouble. Judge Lumbard, apparently viewing the matter as one within his discretion, denied the award of interest because in his judgment much of the delay in bringing the case to trial was attributable to [the plaintiff] and because [the defendant] had not realized any profit from his wrongful conduct.

* * *

"These factors persuaded Judge Lumbard to deny such interest and if the matter had been within his discretion, we would accept his decision. But \$5001 is mandatory and we have been referred to no case interpreting it to permit exercise of discretion." 485 F.2d at 481-82.

In this case for breach of contract, an award of interest is mandatory from the earliest ascertainable date the cause of action existed—i.e., the date payment became due under each Trust Receipt—and not merely from the date of filing the complaint.

The applicable legal rate of interest is 7½% per annum from the date payment became due under each Trust Receipt until August 31, 1972 and 6% per annum from September 1, 1972 until December 8, 1972. See, *Kaufman v. Chase Manhattan Bank, Nat'l Ass'n*, 340 F. Supp. 279 (S.D.N.Y. 1974); *Rock Transport Properties Corp. v. Hartford Fire Ins. Co.*, 312 F. Supp. 341 (S.D.N.Y.), *aff'd*, 433 F.2d 152 (2d Cir. 1970). The total involved here, as interest between the dates of breach under the seven Trust Receipts and the date of commencement of the action, is \$20,756.79.

CONCLUSION

Under New York CPLR Section 5001 and the decisions of this Court, United Bank Limited is entitled as a matter of law to interest at the legal rate on the proceeds of the Trust Receipts from the date payment became due under each Trust Receipt.

Dated: New York, New York
July 7 1975

Respectfully submitted,

CARTER, LEDYARD & MILBURN
Attorneys for Plaintiff-Appellant
United Bank Limited

LOUIS L. STANTON, JR.
CHESTER J. WROBLESKI
Of Counsel

EXHIBIT A*Schedule of Trust Receipt Payments*

<i>Trust Receipt Number</i>	<i>Date Payment Due</i>	<i>Amount Due</i>
184	2/8/72	\$ 37,702.42
88	2/14/72	120,036.58
193	2/15/72	29,223.40
210	3/14/72	14,441.90
237	4/26/72	171,093.01
240	5/30/72	37,884.22
246	5/31/72	22,984.43
		<hr/>
		\$433,365.96

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OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER

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Date *7/7/75*

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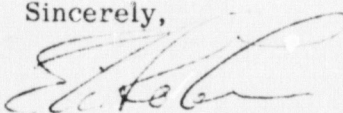
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for the Second Circuit

re: United Bank v. Cosmic Int'l
75-7287 & 75-7320

Dear Sir:

Attached please find 25 copies of the above captioned brief to be exchanged for the ones filed on July 7, 1975. We found it necessary to re-run the job in it's entirety due to a portion of the printing which was unsatisfactory. There have been no changes in the composition of the brief and all parties to the appeal have received the new printing. Please transfer the affidavit of service from the old original and place in the new original.

Sincerely,



E. L. St. Louis

B
p/s

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